87-394

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID J. CATANESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W. PENN HACKNEY, ESQUIRE
1516 Frick Building
Pittsburgh, PA 15219
(412) 391-4700

PUBLISHER'S NOTE:

Original Pagination is not continuous.

QUESTIONS PRESENTED

I. DO TITLE 21, UNITED STATES CODE, §881 AND THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS PERMIT THE GOVERNMENT TO DETAIN AN AIRLINE PASSENGER AND SEIZE HIS BRIEFCASE CONTAINING A LARGE AMOUNT OF CURRENCY BASED ONLY UPON THE GOVERNMENT'S KNOWLEDGE THAT THE CURRENCY IS IN THE BRIEFCASE, AND THEN ATTEMPT TO DEVELOP THE PROBABLE CAUSE REQUIRED FOR THE FORFEITURE OF THE CURRENCY DURING AN INVESTIGATION EXTENDING AT LEAST SEVERAL DAYS THEREAFTER?

II. IF THE ACTIONS OF THE GOVERNMENT DESCRIBED IN QUESTION I ARE AUTHORIZED BY THE STATUTE AND RULES, ARE THOSE STATUTES AND RULES AS SO INTERPRETED UNCONSTITUTIONAL?

PARTIES

Your Petitioner is David J. Catanese, who was Claimant in the United States District Court for the Western District of Pennsylvania and Appellant in the United States Court of Appeals for the Third Circuit. The Defendant in the District Court was $113,800.00 in United States Currency. The Plaintiff in the District Court and Appellee in the Court of Appeals was United States of America. The case was filed in the District Court at Civil Action No. 85-1137 and in the Court of Appeals at No. 86-3587.

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OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania granting the Government's Motion for Summary Judgment was entered on September 16, 1986. It is unpublished and is set forth in the Appendix to this Petition at page 1a. The District Court's decision was affirmed by the United States Court of Appeals for the Third Circuit in a Judgment Order dated April 13, 1987. That Order is set forth in the Appendix at page 17a. Your Petitioner filed a timely Petition for Rehearing in the United States Court of Appeals for the Third Circuit, and that Petition was denied by Order dated May 18, 1987. That Order is set forth in the Appendix at page 19a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on April 13, 1987, and denied a timely Petition for Rehearing on May 18, 1987. By Order dated May 26, 1987, the Mandate was stayed until August 16, 1987 to permit the filing of this Petition.

Section 1254(1) of Title 28, United States Code, confers jurisdiction upon this Court to review cases and judgments in the courts of appeals by writ of certiorari. Pursuant to 28 U.S.C. §2101(c) and Rules 20.4, 28.2 and 29.1, the time for filing a Petition for Writ of Certiorari began to run on May 18, 1987 and expires on August 17, 1987.

STATUTE INVOLVED

Title 21, United States Code,

§881. Forfeitures

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

> (6) All moneys, ... furnished or intended by any person in exchange for a controlled substance in violation of this subchapter [and] all proceeds traceable to such an exchange, ...

(b) Any property subject to civil or criminal forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure withouth such process may be made when

* * *

> (4) the Attorney General has probable cause to believe that the property is subject to civil or criminal forfeiture under this subchapter.

In the event of seizure pursuant to paragraph...(4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

* * *

(d) The provisions of law relating to the seizure, summary and juridicial forfeiture, and condemnation of property for violation of the customs law... shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof....

STATEMENT OF THE CASE

This case arose from the filing by the United States of a forfeiture complaint against $113,800.00 in U.S. Currency. The District Court had jurisdiction by virtue of 21 U.S.C. §881; 28 U.S.C. §§1345 and 1355; and 19 U.S.C. §1610. (The Government's Complaint is found at page 6a of the Appendix filed in the United States Court of Appeals for the Third Circuit at No. 86-3587. Hereinafter, all references to that Appendix will be in the following form: "App. __").

The Government's forfeiture Complaint was filed following the seizure by the Drug Enforcement Administration of $113,800.00 in U.S. Currency at the Pittsburgh International Airport on April 8, 1985. Petitioner (Claimant below) filed an Answer to the Complaint

and a claim for the currency pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. (App. 10a, 14a)

After discovery was conducted, the Government filed a Motion for Summary Judgment (App. 16a), attaching material that had been provided through discovery (App. 17a-73a; additional discovery material is in the Appendix at 74a-109a.) Petitioner filed a cross-motion for summary judgment, based upon the Government's Affidavits and Exhibits, arguing that as a matter of law, the Government's seizure of Petitioner's property was without probable cause and otherwise illegal. (App. 110a)

On September 6, 1986, the Honorable Barron P. McCune issued his Opinion and Order, granting the Government's

Motion for Summary Judgment and denying Petitioner's Motion for same. (App. 111a), and later issued an Order staying its Judgment for the purpose of retaining the court's jurisdiction over the property. (App. 121a)

Your Petitioner appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. After oral argument, that Court affirmed the District Court's Judgment by a Judgment Order on April 13, 1987 and later denied a timely petition for rehearing on May 18, 1987.

The facts of the case are stated in the District Court's Memorandum Opinion, which is set forth in this Petition at Appendix page 1a.
The facts are also stated in more detail in the Affidavit of Edward H. Scheid,

Special Agent for the Drug Enforcement Administration (App. 17a-21a). Briefly, on April 8, 1985, DEA Agents in Pittsburgh received word from a Deputy Sheriff in Fort Lauderdale, Florida that an individual later identified as Anthony Feliziani was carrying an attache case which a baggage x-ray machine had shown to contain currency, and his flight would be stopping in Pittsburgh.

When Feliziani arrived at the Greater Pittsburgh International Airport, he was met by DEA Agents who asserted they believed him to be carrying cocaine, and requested him to accompany the agents to the Airport Police Station so that they "could conduct a search of his luggage in private," (App. 20a) Denying that he had any cocaine and perspiring heavily, Feliziani accompanied the agents to the police station, and fifteen minutes after

their initial approach, he was advised of his right against self-incrimination and gave his consent to the search of his briefcase (App. 20a) The agents questioned Feliziani about his trip to Florida and the currency in some detail (App. 20a-23a), and after almost thirty minutes, the agents telephoned your Petitioner, David J. Catanese, to whom Feliziani had said the currency belonged. (App. 23a-24a) It should be noted that this telephone call occurred at 3:25 P.M., which was after Feliziani's connecting flight to Philadelphia was scheduled to leave Pittsburgh. (App. 95a)

Approximately one hour later (4:25 P.M.), the agents provided Feliziani with a receipt for the briefcase and currency, and permitted Feliziani to go on his way. (App. 25a)

Additional investigation was conducted by DEA agents the next day in connection with the statements made by Feliziani and Petitioner (App. 25a-27a), and "a subsequent check" with Federal Bureau of Investigation (FBI) records reflected that Petitioner had been alleged by "confidential sources" (at least one of whom had an extensive criminal record) to have been involved in drug trafficking in November and December, 1984, and that the Wilmington (Delaware) DEA Office was conducting an investigation of Petitioner for cocaine and methamphetamine distribution in Delaware.

No criminal charge has been filed against Petitioner or Feliziani to date.

REASONS FOR GRANTING THE WRIT

Question I: Do Title 21, United States Code, §881 and the Supplemental Rules for Certain Admiralty and Maritime Claims permit the Government to detain an airline passenger and seize his briefcase containing a large amount of currency based only upon the Government's knowledge that the currency is in the briefcase, and then attempt to develop the probable cause required for the forfeiture of the currency during an investigation extending at least several days thereafter?

A writ of certiorari should be granted on this question because the Court of Appeals, by affirming the District Court's Judgment, has sanctioned an approach to forfeiture law which raises questions that have not been, but should be, settled by this Court. Moreover,

your Petitioner submits that the implication of the District Court's decision (and affirmed by the Court of Appeals), permitting the Government to seize first and ask questions later, are in conflict with the rationale of recent decisions of this Court, in particular, Arizona v. Hicks, ___ U.S. ___, 107 S. Ct. 1149 (1987) and United States v. Place, 462 U.S. 696 (1983).

Additionally, by permitting the Government's actions in this case, the Court of Appeals has affirmed a decision which is in conflict with the decisions of other Courts of Appeals on the same matter. See, for example, United States v. $38,600.00 In U.S. Currency, 784 F.2d 694 (5th Cir. 1986)(no probable cause for seizure of currency from an automobile when the money was found in cash, taped under a car seat at a border checkpoint,

and the agents had also smelled the odor of marijuana inside the car, found a pipe bearing marijuana residue, a package of rolling papers, a small pair of scissors, and a small metal box); United States v. Kemp, 690 F.2d 397, 401 (4th Cir. 1982) ("To be justifiable under 21 U.S.C. §881(b)(4), the Attorney General must have had probable cause to believe at the time of the seizure that the [seized property] had been used in violation of the drug laws, and it must also be reasonable under the Fourth Amendment."); Compare United States v. Szymkowiak, 727 F.2d 95 (6th Cir. 1984)(evidence in plain view may be seized only where the executing officers have probable cause to believe that a nexus exists between the viewed item and criminal activity).

In this case, the District Court

found the probable cause was shown by the following:

> "the suspicious nature of Feliziani's presence in Florida and Pittsburgh, the large sum of money found in the briefcase, the contradictory stories of Feliziani and Catanese, the statement of the owner of the King Neptune Hotel that she had never negotiated with Feliziani or Catanese to sell them the hotel, as well as reliable confidential informant information that Catanese and Feliziana were involved in illegal drug trafficing." (App. 118a; in this Petition at App. 14a-15a)

Petitioner submits that the correctness of the Government's actions must be judged upon their knowledge of the facts giving rise to probable cause at the time the property is seized. To permit otherwise is to countenance Government seizures of property based upon whim or suspicion, leaving the Government secure in the knowledge

that it can keep the property while it investigates further in an attempt to find additional suspicious circumstances.

Based on the foregoing analysis, the only information availabl to the agents was the existence of a large sum of money and Feliziani's nervousness, which counsel submits is always the result of being asked to "accompany" federal agents. Petitioner submits that the DEA agent's conversation with Catanese may not be included in the probable cause equation because it occurred after Feliziani's flight had left, and he (and the currency) must therefore be considered "under arrest" for purposes of fixing the time at which probable cause must be shown.

Even if it is proper to consider the agent's conversation with Petitioner, he submits that inconsistencies between his and Feliziani's explanations do not amount to probable cause for a belief that the currency is, in fact, involved in drug transactions. Given the fact that no immediately apparent contraband, such as drugs, was found, the Government had no more than its own suspicions that the currency was in any way subject to forfeiture. This is demonstrated by the fact that the agents permitted Feliziani to leave; Petitioner submits that the decision to retain the currency was based on what can only be called a "hunch."

Petitioner submits that information learned on the 9th of April (the day after the seizure) and thereafter cannot be used to bolster the

Government's allegation of probable cause, for the reasons put forth above. However, for purposes of argument, if the agent's conversation with the motel owner the next day is considered, Petitioner submits that even a contradicted explanation of the purpose of currency cannot provide probable cause to believe that the currency is or was used in furtherance of drug trafficking. See United States v. $38,600.00 In U.S. Currency, supra.

It is important to note that Petitioner's situation is different in crucial respects from those cases holding that an illegal seizure which occurs after the probable cause has arisen will not, by itself, vitiate the forfeiture action. See United States v. One 1978 Mercedes Benz Four-Door Sedan, 711 F.2d 1297 (5th Cir. 1983); United States v.

One 1977 Mercedes Benz, 708 F.2d 444 (9th Cir. 1983); United States v. $88,500.00, 671 F.2d 293 (8th Cir. 1982).

In those cases, probable cause to believe the property was in violation of 21 U.S.C. §881 clearly existed before the seizures, arguably illegal on other grounds, occurred. In this case, Petitioner submits that because the Government seized the currency before its suspicion that the currency was in violation of the drug laws was supported by probable cause, the seizure violated the plain language of §881(b)(4) and the Fourth Amendment's warrant and probable cause requirements.

Question II: If the actions of the Government described in Question I are authorized by the statute and rules, are those statutes and rules as so interpreted unconstitutional?

A w it of certiorari should be granted on this question because it is an important question which has not been, but should be, decided by this Court.

In this case, the Government filed an in rem forfeiture Complaint approximately one month after the seizure of the defendant currency. This procedure is purportedly authorized by Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims.

This Rule provides for seizures of property by "arrest", simply by filing a Complaint with the Clerk of Courts which alleges a violation of law. There is no requirement for judicial supervision of this process, and moreover, there is no requirement that probable cause be shown. Petitioner submits that these procedures violate the Fourth and

Fifth Amendments to the United States Constitution, because they provide for the seizure of property without a warrant based upon probable cause and for the taking of property by the Government without due process of law. There is a growing authority across the nation that these procedures are unconstitutional. See United States v. Life Ins. Co. of Virginia, Nos. 86-353-M, 86-368-M (D. N.C., October 3, 1986); United States v. $128,035.00 In U.S. Currency, 628 F. Supp. 668 (S.D. Ohio, 1986); cf. Application of Kingsley, 614 F. Supp. 219 (D. Mass. 1985); United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway, 612 F. Supp. 1497 (S.D. Fla. 1985).

It is submitted that the Fourth Amendment applies to procedures under

forfeiture statutes because, "no Act of Congress can authorize a violation of the Constitution." United States v. McCormick, 502 F.2d 281 (9th Cir. 1974), quoting Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

Petitioner submits that the issuance of an in rem warrant pursuant to an Admiralty Rule on a lesser basis than probable cause and without requiring probable cause to be shown to a court prior to the seizure is inconsistent with the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause." A Rule that would permit the seizure of a citizen's property without probable cause must be unconstitutional.

A 1985 Amendment to Rule C purports to provide for pre-seizure judicial review of forfeiture complaints, while excepting forfeiture proceedings from such requirement. Petitioner submits that for the reasons stated above such an exemption is unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

W. Penn Hackney

W. Penn Hackney, Esquire
Attorney for Petitioner,
David J. Catanese

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA: Plaintiff	:	
vs.	:	Civil Action No. 85-1137
$113,800.00 in UNITED STATES CURRENCY, Defendant	:	

M E M O R A N D U M

BARRON P. McCUNE, District Judge
Dated: September 16, 1986.

We consider cross motions for summary judgment in this forfeiture action brought by the United States. All discovery has closed. The claimant in the instant matter is David J. Catanese.

Facts

An affidavit of Edward H. Scheid, Special Agent of the Drug Enforcement Administration (DEA), attached to the government's motion, extensively recites the facts giving rise to the complaint

in this case for the forfeiture of $113,800 in United States currency pursuant to 21 U.S.C. §881(a)(6).

Briefly stated, Agent Scheid's affidavit sets forth the following facts. On April 8, 1985, the Pittsburgh branch office of the DEA received a telephone call from Deputy Sheriff Carol Knapik of the Broward County, Florida Sheriff's Department. Deputy Sheriff Knapik, who is assigned to the Organized Crime and Narcotics Unit at the airport, in Fort Lauderdale, Florida, informed Special Agent Frank Schmotzer of the Pittsburgh office that security personnel had stopped an individual (later identified as Anthony Frank Feliziani) when they observed, through a baggage x-ray machine, numerous large stacks of currency in a briefcase which Feliziani was carrying. The airport security

personnel did not detain Feliziani, but notified Knapik who in turn notified the DEA office in Pittsburgh that Feliziani had boarded USAir flight 648 for Pittsburgh. Agents Scheid and Schiraj were dispatched to the Greater Pittsburgh International Airport to meet Feliziani when he left the plane.

Relying on the description of Feliziani given by the Florida security personnel, Scheid and Schiraj observed Feliziani arrive at the Pittsburgh airport carrying a brown briefcase and black shoulder bag. He walked directly from the passenger arrival area to a public telephone where he made a call lasting approximately two minutes. Upon completion of the call, Feliziani walked to USAir gate 30. At this point Agents Scheid and Schiraj approached Feliziani, identified themselves as DEA agents and

informed him they were conducting a narcotics investigation and believed him to be carrying cocaine from Florida. Feliziani stated that his briefcase contained approximately $114,000 which he obtained for a friend while in Florida and was in the process of taking the money to his friend who resided in Chester, Pennsylvania.

Scheid and Schiraj escorted Feliziani to the ALlegheny County Airport Police Station where Feliziani was advised of his constitutional rights against self-incrimination. He verbally consented to a search of his person and luggage at which time no drugs were found but $113,800 in United States currency and plane tickets in the name of T. Iacona were found. Feliziani informed the agents that the money belong to David Catanese, a friend who asked him to do a favor

while on his vacation in Florida. Feliziani further stated that Catanese gave him plane tickets to use to and from Florida in the name of T. Iacona but that he did not expect any other compensation from Catanese.

Feliziani detailed his instructions from Catanese in the following manner. Upon his arrival in Florida, he was to rent a room at the King Neptune Hotel in Fort Lauderdale and wait for a girl named Pam to deliver a briefcase containing money. She contacted him and they counted and transferred the money into the brown briefcase which Catanese had given to Feliziani.

Upon arrival at the Pittsburgh airport, Feliziani stated that he notified Catanese that he was in Pittsburgh and was to be in Philadelphia later that day. He also told Catanese that he

was stopped and questioned at the Fort Lauderdale airport about the money in the briefcase.

Stating that he did not know anything more about the money or Pam, Feliziani told the agents that Catanese would have to explain the source of $113,800. Using a telephone number supplied by Feliziani, Agent Scheid spoke with Catanese in a recorded conversation. Catanese, who said that he was a professional musician, stated that he had given $114,000 in cash in a brown briefcase to Feliziani and the money belonged to him and four other individuals involved in an investment group which hoped to use the money as a down payment for the purchase of the King Neptune Hotel in Florida. Catanese stated that only $15,000 of the money belonged to him and he refused

to name the four other investors. He further stated that he had planned to travel to Florida to meet Feliziani but he was unable to do so and he requested Feliziani to return to Pennsylvania. Catanese stated that he never told Feliziani about his negotiations with the owners of the King Neptune Hotel and thus he knew nothing about the money.

While Agent Scheid was out of the interview room to call Catanese, Feliziani asked for and received permission from Agent Schiraj to use a public telephone to contact a lawyer. After making his call, Feliziani volunteered to Schiraj that the money was to be used to purchase a bar and/or restaurant for Catanese and despite his lack of experience in real estate and financial matters, Catanese trusted him to make

a proper business decision. Prior to completing his conversation with Catanese, Agent Scheid was informed by Catanese that Feliziani had just telephoned him and told him that he was being detained at the Pittsburgh airport. When confronted by Scheid, Feliziani admitted that he called Catanese and not a lawyer. Feliziani was then given a receipt for the briefcase and the $113,800 and was released.

The following day, April 9, 1985, David Munson, the Resident Agent in charge of the Pittsburgh DEA office contacted Scott Quintaville, the manager of the King Neptune Hotel. Quintaville stated that the King Neptune was for sale through the National Realty Company of Atlanta, Georgia, and that a Mr. Edward Doxey was presently negotiating to buy the hotel. In this same conver-

sation Quintaville confirmed that Feliziani had been registered at the hotel and that a Pam Proudfoot (who was also known as Pam Gambino) was registered at the hotel in the same room that Feliziani had told the DEA agents that she occupied.

Later that same day Agent John Guseman of the Pittsburgh DEA office spoke to the owner of the King Neptune Hotel who stated that she had never negotiated any kind of sale with either Catanese or Feliziani.

A subsequent check with the FBI in the Philadelphia, Pennsylvania, area revealed that a reliable confidential source of information had notified the FBI that he had witnessed Catanese in possession of Kilogram quantities of cocaine, that Catanese was a major distributor of cocaine and methampheta-

mine in eastern Pennsylvania and that Feliziani was a member of the Catanese organization. These allegations were corroborated by other confidential sources used by the FBI. The DEA office in Wilmington, Delaware, indicated that it also had an investigation of Catanese under way for cocaine and methamphetamine distribution in Delaware which corroborated confidential information given to the FBI in regard to Catanese and Feliziani.

Discussion

The government contends that summary judgment should be granted in its favor in that the claimant, David Catanese, has no standing in this matter, and even if he is found to have standing, it has established probable cause and the claimant has no defense.

Claimant's motion for summary judgment, or in the alternative for an evidentiary hearing, is not supported by an accompanying brief. His motion asserts that there is no genuine issue of material fact in the instant case and that he is entitled to judgment as a matter of law, or in the alternative, whether or not the government had probable cause to undertake the warrantless seizure of the defendant currency is an issue of material fact which cannot be determined upon the record, necessitating an evidentiary hearing.

The law is clear in this circuit that only those who have a property interest in the forfeited items have the standing to contest the forfeiture. United States v. One 1981 Datsun 280 ZX, 563 F. Supp. 470 (E.D. Pa. 1983). The government's assertion that claimant

lacks standing to challenge the forfeiture is based on claimant's answers to its interrogatories regarding the ownership of the $113,800. Claimant responded by refusing to answer any question regarding ownership of the currency on the grounds that it might tend to incriminate him (see Government Exhibit C, questions 10, 11, 12). The government contends that his answers to the interrogatories, filed with its motion, are part of the record, and claimant therefore has not asserted the requisite ownership required for standing to challenge the forfeiture. Claimant has not responded to the government's assertion even though he has been given ample time to do so. It would appear then, that the government's contention that claimant lacks standing is unopposed.

We need not dwell on the standing issue, however. The merits of this case weigh heavily on the government's side. In a forfeiture action brought pursuant to 21 U.S.C. &881(a)(6), the government bears the initial burden of showing probable cause to believe that the property in question was used in violation of federal narcotics law. Once the government establishes probable cause, the burden of proof shifts to the defendant to show that the property was not to be used for this purpose. United States v. $55,518.05 In U.S. Currency, 728 F.2d 192 (3d Cir. 1984); United States v. 1977 Lincoln Mark V Coupe, 643 F.2d 154 (3d Cir. 1981), cert. denied 454 U.S. 818 (1981). Circumstantial evidence may be sufficient to satisfy the government's initial burden of showing probable cause in a forfeiture action,

even where no actual drug transaction has been witnessed. United States v. $364,960.00 In United States Currency, 661 F.2d 319 (5th Cir. 1981); United States v. $2,500.00 in United States Currency, 689 F.2d 10 (2d Cir. 1982), cert. denied 465 U.S. 1099 (1984), reh. den. 466 U.S. 994 (1984).

Upon review of the record, we find that the government has met its burden of showing probable cause in the instant case. Special Agent Scheid's affidavit sets forth the suspicious nature of Feliziani's presence in Florida and Pittsburgh, the large sum of money found in the briefcase, the contradictory stories of Feliziani and Catanese, the statement of the owner of the King Neptune Hotel that she had never negotiated with Feliziani or Catanese to sell them the hotel, as

well as reliable confidential informant information that Catanese and Feliziani were involved in illegal drug trafficing.

Claimant has failed to respond on the merits of this case and thus has failed to meet its burden to show that the $113,800 was not used in illegal drug trafficing as contended by the government. Accordingly, we find no merit in claimant's bald motion for summary judgment or alternative motion for an evidentiary hearing to determine probable cause under 21 U.S.C. §881(a)(6).

For the reasons stated above, we will grant the government's motion for summary judgment. Accordingly, claimant's motion for summary judgment or alternative motion for an evidentiary hearing will be denied.

An order follows.

/s/ Barron P. McCune
Barron P.McCune
Senior United States District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA: Plaintiff	:	
vs.	:	Civil Action No. 85-1137
$113,800 In United States Currency, Defendant	:	

O R D E R

AND NOW, September 16, 1986, the government's motion for summary judgment is granted. Claimant's motion for summary judgment, or in the alternative, for an evidentiary hearing, is denied.

/s/ Barron P. McCune
BARRON P. McCUNE
Senior United States District Judge

cc: James J. Ross, A.U.S.A.

W. Penn Hackney, Esq.
1516 Frick Building
Pittsburgh, PA 15219

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-3587

$113,800.00 IN UNITED STATES CURRENCY

DAVID CATANESE,
Claimant-Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh) (D.C. Civil No. 85-1137)
District Judge: Barron P. McCune

Argued April 6, 1987

Before: SLOVITER, BECKER, Circuit Judges and FISHER, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by claimant-appellant, it is

Adjudged and Ordered that the judgment of the district court be and is hereby affirmed.

Costs taxed against the claimant-appellant.

By the Court,

/s/ Dolores K. Sloviter

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: April 13, 1987

* Hon. Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3587

UNITED STATES OF AMERICA

v.

$113,800 IN U.S. CURRENCY,
DAVID J. CATANESE,
Appellant.

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTTOM, SLOVITER, BECKER, STAPLETON, MANSMANN, Circuit Judges, and FISHER, District Judge*

The petition for rehearing filed by Appellant, David Catanese,

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores Sloviter
Circuit Judge

Dated: May 18, 1987

*Hon. Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation, as to panel rehearing only.

CERTIFICATE OF SERVICE

I, W. Penn Hackney, Esquire, Attorney for Petitioner, David J. Catanese, hereby certify that I have served a true and correct copy of the within Petition for Writ of Certiorari upon the following by first-class mail, postage prepaid, this 17th day of August, 1987:

Hon. Charles Fried
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

Sally Mrvos
Clerk of the U.S. Court of
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No. 87-394

In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID J. CATANESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner has standing to contend that DEA agents lacked probable cause to believe that certain United States currency in the possession of a third party was "intended to be furnished by any person in exchange for a controlled substance" (21 U.S.C. 881(a)(6)) and therefore could not be seized in accordance with 21 U.S.C. (Supp. III) 881(b)(4).

2. Whether, if petitioner does have standing, the seizure of the currency satisfied the Fourth and Fifth Amendments.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 17a-18a) is unreported. The opinion of the district court (Pet. App. 1a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1987. A petition for rehearing was denied on May 18, 1987 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on August 17, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the seizure of $113,800 in United States currency pursuant to 21 U.S.C. (Supp. III) 881(b)(4), the government instituted a proceeding under 21 U.S.C. 881(d) to forfeit the currency. The United States District

Court for the Western District of Pennsylvania granted the government's motion for summary judgment and ordered the forfeiture.

1. The relevant facts are summarized in the opinion of the district court (Pet. App. 2a-10a). On April 8, 1985, the Pittsburgh branch office of the Drug Enforcement Administration (DEA) learned from a law enforcement official in Florida that Anthony Frank Feliziani had boarded a flight from Ft. Lauderdale to Pittsburgh. When Feliziani's baggage passed through an x-ray machine at the Ft. Lauderdale airport, security personnel saw a number of large stacks of currency in Feliziani's briefcase. Pet. App. 2a-3a. Security personnel in Ft. Lauderdale questioned Feliziani, who they estimated to be in his early 20's, about the currency. He admitted carrying the currency and acted very nervous and flustered during the questioning (C.A. App. 18a).

Two DEA agents were dispatched to the Greater Pittsburgh International Airport to meet the plane on which Feliziani was a passenger. The agents saw Feliziani arrive at the Pittsburgh airport carrying a brown briefcase and a black shoulder bag. Feliziani went directly from the passenger arrival area to a public telephone. After making a call that lasted approximately two minutes, Feliziani walked to another passenger gate. At that point the DEA agents approached Feliziani, identified themselves as DEA agents, stated that they were conducting a narcotics investigation, and told Feliziani that they believed he was carrying cocaine from Florida. Feliziani replied that he had obtained $114,000 in Florida for a friend and that he was en route to Chester, Pennsylvania, to deliver the money to his friend. Pet. App. 3a-4a.

The agents escorted Feliziani to the airport police station. After Feliziani was advised of his constitutional rights, he consented to a search of his person and his luggage. The agents found no drugs, but they did find $113,800 in United States currency in the bag. Feliziani said the currency belonged to petitioner. Pet. App. 4a.

Feliziani said that petitioner had asked him to pick up the currency as a favor while Feliziani was on vacation in Florida. In the course of their search, the agents also found airline tickets in the name of T. Iacona. Feliziani said that petitioner had given him the airplane tickets to use in making the trip. He added that he did not expect any other compensation from petitioner for the "favor" he was doing. Pet. App. 4a-5a.

Feliziani recounted that petitioner had instructed that upon his arrival in Florida, he was to rent a room at the King Neptune Hotel in Fort Lauderdale and wait for someone named "Pam" to deliver a briefcase containing money. Feliziani followed those instructions, he was contacted by "Pam," and the two of them counted and transferred the money into the brown briefcase that petitioner had supplied. Pet. App. 5a.

Feliziani also told the agents that when he arrived at the Pittsburgh airport on his return trip he notified petitioner that he expected to reach Philadelphia later that day. He also told petitioner that he had been stopped at the Fort Lauderdale airport and questioned about the money in the briefcase. Pet. App. 5a-6a.

Feliziani stated that he knew nothing more about the money or about "Pam," and that only petitioner could explain the source of the $113,800. Feliziani then gave the agents a telephone number at which petitioner could be reached. One of the DEA agents used that number to call petitioner. In that conversation, which was recorded, petitioner identified himself as a professional musician and said that he had given $114,000 in cash to Feliziani in a brown briefcase. Petitioner added that the money belonged to a group of five investors, including himself, and that it was intended as a down payment on the purchase of the King Neptune Hotel. Petitioner said that only $15,000 of the money belonged to him, but he refused to name the other four investors. Pet. App. 6a-7a.

While one DEA agent was speaking to petitioner, the other agent granted Feliziani's request to call a lawyer. After returning from the public telephone, Feliziani volunteered that the money in his briefcase was to be used to purchase a bar and restaurant for petitioner, and that petitioner trusted him to make a sound business decision despite his lack of experience in real estate or in financial matters. At about the same time that Feliziani was making that statement to one DEA agent, petitioner, who was still talking on the telephone with the other agent, acknowledged that Feliziani had just called him and had told him that he was being detained at the Pittsburgh airport. When confronted with that information, Feliziani admitted that he had not called a lawyer, but had called petitioner. Feliziani was then released. The agents retained custody of the briefcase and the $113,800. Pet. App. 7a-8a.

The following day, DEA agents learned from the manager of the King Neptune Hotel that the hotel was for sale through the National Realty Company of Atlanta, Georgia, and that someone other than petitioner was negotiating to purchase the property. The manager also confirmed that Feliziani had been registered at the hotel and that Pam Proudfoot (also known as Pam Gambino) was registered at the hotel in the room that Feliziani had told the DEA agents that she occupied. Later that same day a DEA agent was informed by the owner of the King Neptune Hotel that she had never negotiated for any kind of sale with either petitioner or Feliziani. Pet. App. 8a-9a.

The FBI office in Philadelphia subsequently reported that a reliable confidential informant had seen petitioner in possession of kilogram quantities of cocaine, that petitioner was a major distributor of cocaine and methamphetamine in eastern Pennsylvania, and that Feliziani was a member of petitioner's organization. Those allegations were corroborated by other confidential sources. The DEA office in Wilmington, Delaware, indicated that it

was also investigating petitioner for cocaine and methamphetamine distribution in Delaware. Pet. App. 9a-10a.

2. On the basis of those facts, the district court granted the government's motion for summary judgment. The court observed that in a forfeiture action under 21 U.S.C. 881(d), the government bears the threshold burden of establishing probable cause to believe that the property in question has been involved in a violation of federal narcotics laws (Pet. App. 13a). The government met its burden here, the district court concluded, because Feliziani's presence in Florida and Pittsburgh was suspicious; he was carrying an extraordinary quantity of cash; his story to the authorities contradicted petitioner's; petitioner's story was inconsistent with information provided by the owner and the manager of the Neptune Hotel; and reliable informants disclosed that Feliziani and petitioner were involved in narcotics trafficking (*id.* at 14a-15a). When petitioner failed even to attempt to rebut the government's prima facie showing of probable cause, the district court granted the government's motion for summary judgment (*id.* at 15a).

ARGUMENT

1. Petitioner asserts (Pet. 12-19) that the DEA agents who seized Feliziani's bag containing $113,800 in United States currency lacked probable cause to seize the currency. Petitioner, however, lacks standing both to contest the forfeiture and to challenge the seizure.

A party seeking to contest the government's forfeiture of money or property used in violation of federal law "must first demonstrate an interest in the seized item sufficient to satisfy the court of its standing to contest the forfeiture." *United States* v. *$364,960 in United States Currency*, 661 F.2d 319, 326 (5th Cir. 1981). See *United States* v. *$15,500*, 558 F.2d 1359, 1361 (9th Cir. 1977). The burden of establishing one's standing, moreover, rests

upon the claimant (*United States* v. *$364,960 in United States Currency*, 661 F.2d at 326). Here, the currency was seized not from petitioner but from Feliziani, and petitioner refused to acknowledge in response to government interrogatories that the currency belonged to him (see Pet. App. 12a). Petitioner accordingly has failed to demonstrate his standing to challenge the forfeiture.

In addition, even if petitioner had claimed ownership of the currency and thus had standing to contest the forfeiture, he would not have standing to raise a Fourth Amendment objection to the detention and questioning of Feliziani at the Pittsburgh airport, which is the thrust of his challenge to the seizure of the currency. Petitioner cannot plausibly contend that all of the evidence gathered by the agents during the period after Feliziani was detained—including the evidence that petitioner's story about the currency was a falsification and the evidence that petitioner and Feliziani were involved in drug dealing—did not constitute probable cause to justify the forfeiture. Instead, he argues that at the time Feliziani was detained, the agents did not have sufficient cause to justify detaining him. As to the brief detention of Feliziani at the Pittsburgh airport, however, only Feliziani can complain, because only Feliziani's Fourth Amendment rights were at issue. When Feliziani subsequently consented to the search of his bags and voluntarily answered the agents' questions, the agents quickly developed probable cause to justify the seizure of the currency under 21 U.S.C. (Supp. III) 881(b)(4). Because Feliziani had been given custody of the currency for that period, petitioner did not have a custodial interest in the currency that was infringed by the temporary detention and questioning of Feliziani. Before any interest of petitioner's was implicated, the agents had plainly acquired probable cause for the seizure.

Finally, even if petitioner had standing to contest both the forfeiture and the seizure, his contention would have

no merit. Before the DEA agents encountered Feliziani in Pittsburgh, they already knew that he had traveled from Fort Lauderdale, a known source city for narcotics (see *United States* v. *$84,000 United States Currency*, 717 F.2d 1090, 1092 (7th Cir. 1983), cert. denied, 469 U.S. 836 (1984)) and that he was a very young man carrying an unusually large sum of cash. Those facts, plus the nervousness that Feliziani exhibited upon being questioned about the currency in Ft. Lauderdale gave the agents in Pittsburgh a reasonable basis for a brief investigative stop. After encountering the agents and being advised of his constitutional rights, Feliziani consented to a search of his bag, in which the agents discovered the currency. Feliziani explained the money in a way that was inconsistent with statements offered by petitioner, and he acknowledged traveling under an alias. In addition, although both Feliziani and petitioner ultimately claimed that the trip to Florida was a vacation that included, as a favor, an agreement to negotiate a real estate transaction for petitioner, the agents learned that Feliziani spent just two days in Florida and had no real estate or financial experience. Under all these circumstances, the agents had probable cause to believe the currency had been intended for use "in exchange for a controlled substance" (21 U.S.C. 881(a)(6)).

Petitioner nevertheless contends (Pet. 13), without elaboration, that the decision below conflicts with the "rationale" of this Court's decisions in *Arizona* v. *Hicks*, No. 85-1027 (Mar. 3, 1987), and *United States* v. *Place*, 462 U.S. 696 (1983). *Place* involved a defendant in a criminal prosecution who, after being stopped in an airport, refused to consent to a search of his luggage. His luggage was then improperly detained without sufficient legal justification. *Hicks* involved the question whether an officer who looked underneath stereo equipment was thereby conducting an unauthorized "search." Here, by contrast, the lawfulness of the search of the bag is not

seriously at issue. Feliziani consented to the search of his bag, and by the time they had completed the search and the questioning of Feliziani and petitioner, the agents had sufficient justification to retain the currency pending possible forfeiture proceedings.[1]

2. Petitioner also claims (Pet. 19-23) that the procedures governing the filing of forfeiture petitions by the government are unconstitutional. He contends that the procedure set forth in Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims, violate the Fourth and Fifth Amendments because it authorizes a seizure of property without probable cause. In this case, however, the government instituted the forfeiture proceedings by seizing the currency pursuant to the alternative procedure set forth in 21 U.S.C. (Supp. III) 881(b)(4), which requires probable cause to justify the seizure. The

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[1] There is likewise no merit to petitioner's claim (Pet. 13-14) that the decision below conflicts with *United States* v. *Kemp*, 690 F.2d 397 (4th Cir. 1982), or *United States* v. *$38,600 in United States Currency*, 784 F.2d 694 (5th Cir. 1986). In *Kemp*, as here, both the district court and the court of appeals concluded that the property in question was involved in a violation of narcotics laws. See 690 F.2d at 401. In *United States* v. *$38,600, supra,* the court of appeals held that the government failed to establish probable cause for the forfeiture of $38,600 in currency. The evidence at trial in that case showed that the cash was found beneath a car seat near a pipe containing marijuana residue, and the claimants failed to explain truthfully why they were traveling with the money. The instant case is readily distinguishable, however, because in this case undisputed evidence presented with the government's summary judgment motion showed that Feliziani traveled under an alias, from a known source city for narcotics, and offered an explanation for his conduct that was not only highly improbable, but also failed to accord with petitioner's explanation. In addition—a factor that was significantly absent in *$38,600*—reliable informant information linked both petitioner and Feliziani to drug dealing. The court in *$38,600* made it clear that if there had been any such evidence in that case, the forfeiture would have been upheld. See 784 F.2d at 698.

government then commenced a forfeiture action under 28 U.S.C. 881(d). The government did not at any point rely on the authority of Rule C in effecting the seizure. Petitioner's objection to the procedure authorized by Rule C is therefore not presented by the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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